IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b)

Description of Case

Jail Appeal No. 1976 of 2001

Meen Bahadur

Versus

State

Date of decision : 23.11.04

For the approval of:-

Hon'ble Mr. Justice J. C. S. Rawat

- Whether the order/judgment should be sent to the reporters for reporting?

(Yes)

- Whether the reporters be allowed to see the judgment?

(Yes)

Dated -23.11.04

LSR

IN THE HIGH COURT OF UTTARANCHAL

AT NAINITAL

JAIL APPEAL NO.1976 OF 2001

Meen Bahadur S/o Khadak Bahadur,
R/o Naya Gaon ward no.6,
P.O. Mul Moole
P.S. Bosi Shahar
District Lamjug Gandakia Pokhra Anchal (Nepal)
---------- Appellant

Versus

State of Uttaranchal ----------Opposite Party

Ms. Nishat Intazar learned Amicus Curiae for the appellant.
Mr. Lalit Verma learned A.G.A. for the State.

HON'BLE J.C.S.RAWAT, J.

1. This is a criminal appeal preferred by appellant Meen Bahadur against the judgment and order dated 27.9.2001 passed by Sri R. C.Gautam, the then Addl. Sessions Judge/I FTC, Kashipur district Udham Singh Nagar by which he convicted the appellant u/s 20 Narcotic Drugs and Psychotropic Substance Act, 1985 (for the short 'N.D.P.S. Act') and sentenced him for 10 years rigorous imprisonment and a fine of Rs. one Lac. In default of payment of fine the appellant shall undergo four years imprisonment.

2. Briefly stated the prosecution case is that on 20.09-2000 S.I. Om Prakash (PW-1) alongwith Constables Ombir Singh (PW-2), Riyasat Ali (PW4), Rohash Singh and Rajendra Singh of border check post, P.S.Banbasa were on checking duty on the border. At 05.20 p.m. one person came in front of check post from Banbasa barrage Nepal carrying one bag of Rexene on his shoulder. He was stopped and was asked his name. He told his name Meen Bahadur. He told that he had Charas in his bag, which was being

carried from Nepal and was to be brought to Delhi. On asking whether he wanted to be searched before a Gazetted Officer or a Magistrate, the appellant stated that the search might be taken by the S.I. himself. In this connection consent letter (Ex.Ka1) was written. The names and addresses from the coming and going persons were asked but none was prepared to give evidence and they showed their inability. On search a bundle of one kilogram and 700 grams of Charas was recovered out of which 50 grams Charas was taken as sample. The appellant could not show any license for the same. The recovered article was sealed in a bundle. Recovery memo (Ex.Ka3) was prepared and a copy was supplied to the appellant. The appellant and the recovered article were brought to the police station Banbasa where F.I.R. (Ex.Ka.3) was recorded on the same day at 09:35 p.m. and a case u/s 18/20 N.D.P.S. Act was registered against the appellant and an entry (Ex.Ka 4) was made in G.D. The Investigating Officer Sheedshu Pal Singh (PW3) prepared site plan (Ex.Ka6) and after completing the formalities of investigation submitted charge sheet (Ex.Ka-7) against the appellant.

3. Charge was framed against the appellant U/s 20 N.D.P.S. Act to which he pleaded not guilty and claimed to be tried.

4. The prosecution in support of its case examined PW1 Om Prakash who was the head of the police party and proved consent letter Ex Ka 1and recovery memo Ex.Ka2, PW2 Ombir Singh who was also the member of the police party and PW3 S.I. Sheeshu Pal Singh investigated the case, proved Ex.Ka3 to Ex.Ka9 and submitted charge-sheet Ex Ka 7 against the appellant.

PW4 Gulam Rasool constable proved Ex.Ka8 and Ex.Ka9.

5. The appellant in his statement U/s 313 Cr.P.C. denied the prosecution allegations and stated that he has been falsely implicated in the case.

6. On appreciation of evidence on record the learned trial court found the appellant guilty 20 N.D.P.S. Act and convicted and sentenced the appellant as above.

7. I have heard the learned counsel for the parties and perused the evidence on record.

8. The prosecution adduced the evidence of Om Prakash PW-1, Ombir Singh PW-2 and Gulam Rasool PW-4 who have narrated the whole incident as indicated in para no. 2 of the judgment.

9. The learned Amicus Curiae assailed the conclusion of the trial court and submitted that the mandatory provisions of section 50 of NDPS Act have not been complied with. The learned AGA refuted the contention. The prosecution witnesses have categorically stated in their evidence that the police party was on patrol duty and they found that one person was coming in front of police check post from Banbasa barrage keeping one bag on his shoulder. When the police intercepted him he informed the police that he had Charas in his bag, which was carried from Nepal and was to be brought to Delhi. Immediately thereafter S.I. Om Prakash asked him as to whether he wanted to be searched before a Gazetted Officer or a Magistrate. The appellant requested S.I. Om Prakash that he did not want to be searched before a Gazetted Officer or a Magistrate. He might be searched by the S.I. himself. In this connection Om Prakash PW-1

obtained consent letter Ex. Ka-1 from the appellant. All the three prosecution witnesses have categorically stated that before search being made the appellant was made aware of his said valuable rights and when he declined to the officer the police party made the search. Ex. Ka-3 is the memo of arrest and recovery of the contraband prepared on the spot itself and it also incorporates the compliance of the above mandatory requirement. In fact this is cogent documentary evidence, which corroborates the evidence of prosecution witnesses with regard to the compliance of the above mandatory provision. On the plain reading of section 50 of NDPS Act would come into play only in the case of search of a person as distinguished from search of any premises etc. However, if the empowered officer without any prior information as contemplated by section 42 of NDPS Act makes a search or causes arrest of a person during the normal of investigation into an offence or suspected offence or completion of search a contraband under the NDPS Act is also the requirement of section 50 are not attracted. The contraband was recovered from the bag. The interception of the appellant on suspicion was unexpected and per chance. It has been held in ***Kalema Tumba v. State of Maharashtra JT 1999 (8) SC 293*** that the accused was a person who arrived at Sahara International Airport (Mumbai) and when the intelligence officer of Narcotic Central Bureau checked one of his baggages he deducted two kgs of Heroin therefrom. Before the baggage was opened the accused was asked to identify it and when he did so the officer again checked it up with the baggage tag affixed on the Air Ticket in the possession of the accused. The contention that the conditions u/s 50 of the Act were

not complied with before the baggage was searched, has been repelled by the Apex Court from the premises that it was not a search of the 'person' of the accused. In short, the submission so made by the learned Amicus Curiae has no force and the trial and conviction of the appellant cannot be said to be bad in law.

10. The learned Amicus Curiae further submitted that no public witness of the occurrence was made available by the police to support their version of the arrest and recovery although the arrest and recovery is alleged to have taken place at 05:20 p.m. on 20-09-2000 at police check post Banbasa Barrage, which is a prominent place. This aspect of the matter raised suspicion in the claim of the prosecution as well as in the veracity of the evidence of all the prosecution witnesses. The learned AGA refuted the contention. According to the prosecution evidence the incident took place when the police party was on patrol duty and the appellant was intercepted when suspicion arose on the appellant, the same being a case of chance arrest and recovery, there was no opportunity to take any public witness at that time. The prosecution evidence has categorically proved that the police party tried to take the public witnesses and none was prepared to give evidence and they showed their inability. The submission of learned Amicus curiae failed to make any dent in the prosecution version and evidence.

11. Learned Amicus Curiae further submitted that PW1 Om Prakash S.I. had not recorded the information in respect of appellant being involved before proceeding to arrest him in this case. Learned AGA refuted the contention and contended that the appellant was not arrested on receiving information so the provisions of section 42 of NDPS Act are not applicable. It was

further contended that the appellant was intercepted while the police party was on patrol duty. Section 42 of NDPS Act has two limbs. The first limb deals with the recording of information and second with the conducting of search. With regard to first limb dealing with the recording of information received and the other relating to the belief of the officer based upon his personal knowledge. The recording of information and belief thereof is only required in the case when the information is received and not in the case of sudden arrest. It is settled position of law that if during such search or arrest there was a chance recovery of any contraband then the police officer should thereafter proceed in accordance with the provisions of NDPS Act. If he happens to be an officer empowered to conduct search then he from that stage on ward should carry out the investigation in accordance with the provisions of NDPS Act. In the instant case the appellant was apprehended on the spot and through the sudden search was made. Had the police party not done so immediately the opportunity of seizure and arrest of the appellant could have been lost.

12. Learned Amicus Curiae referring the provisions of section 57 and section 42(1) of NDPS Act submitted that a safeguard against false implication of the appellant by the police officer provided under the aforesaid provision has not been complied with in the instant case. The prosecution evidence clearly reveal that after the arrest and seizure of the contraband substance the appellant was brought to the police station alongwith the contraband Charas and it was kept in Malkhana. The prosecution witnesses have stated in their evidence that the officer-in-charge of the

police station informed the superior officer through wireless about the arrest and seizure of the contraband. The prosecution evidence is cogent and believable. The copy of wireless message was brought on record. According to the provisions of section 42 of NDPS Act the arresting officer has to send the information forthwith to his superior officer. By sending the wireless message by the officer-in-charge of the police station to his superior officer is substantial compliance of the sections. Section 57 of NDPS Act also provides that it is obligatory on the prosecution that while making arrest or seizure the officer should make full particulars of such arrest or seizure and send it to his immediate officer within 48 hours of such arrest or seizure. In the present case it is proved that there is no evidence to the effect that any written report was sent to the superior officer except that a wireless message. This provision is not mandatory but directory. No prejudice has been caused to the appellant. The copy of the FIR and other relevant documents were sent to the Magistrate concerned who granted the remand to the appellant on 21-09-2000. The case diary of the said offence is also on record on which the learned Magistrate has made an endorsement ‘Seen’ and signed on it on 21-09-2000. The wireless massage was sent to the superior officer in this connection. Sending of wireless message to his superior officer constitutes a substantial compliance and mere absence of such report cannot be said to prejudice to the appellant. These provisions are not mandatory but directory. When the substantial compliance has been done it would not vitiate the prosecution.

13- It has been held in **State of Punjab vs. Balbir Singh (1994) 3 Supreme Court Cases 299**, that the provisions of sections 52 and 57 of N.D.P.S. Act which deal with the steps to be taken by the officers after making arrest or seizure under sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc., then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merit of the case.

14- Learned Amicus Curiae also contended that the learned Sessions Judge sent letter to the public analyst on 22-09-2004 through constable Gulam Rasool PW-4 along with the sample of seal and the sample for analyses and the public analyst on 26-09-2000 received the same. Learned Amicus Curiae further contended that the delay of four days in sending the contraband creates a doubt on the veracity of the prosecution evidence. Learned AGA refuted the contention. The prosecution produced Gulam Rasool PW-4 who stated that he deposited the sample along with the sample seal with the public analyst and the letter of learned Sessions Judge. He further stated in his evidence that the contraband was deposited in the same condition as it was received from Malkhana. Thus the evidence is cogent and credible.

15- In view of the above discussion, I am of the view that the learned trial court has rightly found the appellant guilty u/s 20 of the N.D.P.S. Act and no interference need to be required by this court. The

conviction and sentence awarded by the trial court are maintained. The appeal lacks merit and is dismissed.

16. Let a copy of this judgment alongwith the record of the case be sent to the trial court for needful compliance under intimation to this court within two months positively.

(J.C.S.RAWAT J.)

NOVEMBER 23 2004